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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

Case No. 81-

RONALD J. STRAIGHT,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I. WHETHER THE FLORIDA SUPREME COURT CONSTRUED OR APPLIED SECTION 921.141, FLA.STAT. (1975), IN AN IMPERMISSIBLY VAGUE OR OVERBROAD FASHION IN VIOLATION OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER A STATE IS OBLIGATED BY THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO PROVIDE PETITIONER A FAIR TRIAL BEFORE AN IMPARTIAL JURY.

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STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts the portion of the Petition for Writ of Certiorari setting forth the Questions Presented, the Citations to Opinion Below, Jurisdiction, and Constitutional and Statutory Provisions Involved found on pages i through iii of the Petition. In accepting the Questions Presented, Respondent does not accept any assumptions of law contained in the points as set forth.

STATEMENT OF THE CASE AND FACTS

Respondent would invite this Court to review the opinion in Straight v. State, 397 So.2d 903 (Fla. 1981) wherein the Florida Supreme Court has set forth the facts in the instant cause. The Court observed:

> The evidence at trial showed that at the time of the crime, the Appellant and Timothy Charles Palmes were living in an apartment also occupied by Jane Albert and her seven year old daughter, Stephanie. Mrs. Albert was employed by James Stone at his furniture store. On the day of the crime, in accordance with a plan conceived by Jane Albert, Palmes, and the Appellant, James Stone was lured to the apartment. When Stone left the store to go to the apartment, Albert telephoned Palmes and Straight to tell then Stone was on his way.
>
> When Stone arrived at the apartment, the seven year old Stephanie, on instructions from Palmes and Straight, admitted him and directed him to one of the bedrooms. There Palmes and Straight bound him with wire and placed him in a large box they had constructed in the apartment. They tormented him with hammer blows and stabbings for approximately half an hour before he died from the knife wounds. Then, they sealed the box, removed it to a truck, and dumped it in the St. Johns River.
>
> The next day, Appellant, Palmes, Albert, and Stephanie left Florida, taking Stone's car, his credit cards, money from his wallet, and several days' cash receipts from the furniture store. They were arrested in California. Straight fled as police officers approached him and attempted to avoid arrest by firing at the officers. Mrs. Albert was given immunity and testified at trial as a witness for the State.
>
> Palmes and Straight were jointly indicted for murder in the first degree. Their trials were severed. Palmes was tried first and convicted. Among the items of evidence introduced against him was his confession. There was news media coverage of the

> fact that he made a confession and also of his later retraction and his repudiation of the confession at trial.

[Straight v. State, 397 So.2d at 905]

On March 19, 1981, the Florida Supreme Court in its decision in Straight v. State, 397 So.2d 903 (Fla. 1981) affirmed the judgment and sentence imposed against Straight.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner argues on direct appeal five issues. Each assailed the validity of the judgment in that he asserted that five trial errors occurred; each individually or as a whole, required reversal as to the judgment. There was no attack as to the propriety of the sentence imposed.

The Florida Supreme Court in reviewing the validity of imposing the death penalty in Petitioner's case, independent of Petitioner's failure to challenge the validity of the sentence imposed, held:

> . . . We have given careful consideration to each of the Appellant's stated grounds of appeal, as the discussion to follow will show. We have reviewed the entire record of the proceedings below in order to determine whether the jury's verdict of guilt was supported by competent, substantial evidence. We have also reviewed the sentencing proceeding to determine whether the sentence of death is appropriate to this case under the law. Section 921.141(4), Fla.Stat. (1975). We affirm the conviction and the sentence.

[397 So.2d at 904-905]

Petitioner's first issue for review asserts that the Florida Supreme Court unconstitutionally applied the aggravating circumstance of "especially heinous, atrocious, or cruel" in an overbroad and impermissibly distorted manner in light of this Court's decision in Godfrey v. Georgia, 46 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980). This issue was not raised by Petitioner in his State direct appeal, and therefore, pursuant to Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969) is not properly before the Court.

Petitioner's second question as to whether he received a fair trial based on the three trial errors presented to the State appellate court, all fail to raise issues which would entitle Petitioner to this Court's review. Petitioner cites state authority and asserts that the Florida Supreme Court misapplied state law. In view of his failure to posture the issues in terms of federal constitutional rights, Petitioner's second question for review is wanting.

The Florida Supreme Court in reviewing whether the trial court erred by giving an improper and insufficient instruction to the jury as to the proper use of evidence of Petitioner's prior conviction of crime; whether the trial court erred in admitting, by depositions of Anaheim, California police officers Gerald Stece and Frank Tresenrider, evidence that the Petitioner has been involved in a gun battle with the two officers and others at the time of his arrest in Anaheim, California; and whether in light of the extensive publicity covering the crime for which Petitioner was on trial, the trial court's denial of Petitioner's timely made Motion for Change of Venue was error in violation of Petitioner's fundamental right to trial by impartial jury, concluded that none of the aforenoted issues required reversal of Petitioner's judgment.

REASONS FOR NOT GRANTING THE WRIT

I.

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE COURT'S TREATMENT OF STATUTORY AGGRAVATING CIRCUMSTANCES IS UNCONSTITUTIONALLY OVERBROAD AND IMPERMISSIBLY DISTORTS THE WEIGHING PROCESS REQUIRED TO PREVENT ARBITRARY INFLICTION OF THE DEATH PENALTY.

Petitioner is not entitled to review on this issue in that he did not raise this particular claim on direct appeal to the Florida Supreme Court. Pursuant to Cardinale v. Louisiana, supra, Florida's highest appellate court has not had an opportunity to review the issue for which Petitioner now seeks redress.

Taking comfort in this Court's decision in Godfrey v. Georgia, supra, Petitioner asserts that:

> In the present case, both the trial court and the Supreme Court of Florida fail to narrow Florida's construction of the death sentence. . .

[Petitioner's Petition, p.1]

On direct appeal, Petitioner raised five issues for review, each asserting trial errors charging that the judgment was infirmed and therefore, should be reversed. Petitioner raised no complaint about the imposition of the death sentence. The Florida Supreme Court in its review of Petitioner's appeal in Straight v. State, supra, pursuant to the dictates of Section 921.141(4), Fla.Stat., (1975), "also reviewed the sentencing proceeding to determine whether the sentence of death" was appropriate to the case before them. Straight v. State, 397 So.2d at 905.

In so holding, the Florida Supreme Court reviewed each aggravating circumstance found to be present, and in particular, concluded that:

> The trial judge's finding that the capital felony was especially heinous, atrocious, and cruel was based on evidence that Appellant directly participated in the murder inflicted by multiple stab wounds and bludgeoning. The evidence supports the factual findings and the facts establish this statutory factor. See, e.g., Washington v. State, 362 So.2d 658 (Fla. 1978) cert.denied 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979); Funchess v. State, 341 So.2d 762 (Fla. 1975), cert.denied 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977).
>
> Upon our review of the sentencing proceedings and the court findings based on the whole record, we conclude that there was no prejudicial error in the sentencing phase and that the court properly found several aggravating circumstances and no mitigating circumstances. The sentence of death is proper.
>
> [397 So.2d at 910]

Assuming for the moment that Petitioner had properly argued this particular issue to the Florida Supreme Court and said issue is ripe for review by this Court, Petitioner's complaint that the Florida Supreme Court wrongfully condoned the applicability of the aggravating circumstance of "heinous, atrocious, or cruel" in Petitioner's case, is erroneous. Unlike Godfrey v. Georgia, supra, the affirmance of the aggravating circumstance of "heinous, atrocious, or cruel" in the instant case was not predicated on a standardless and unchannelled imposition of death sentences based on this aggravating circumstance. Indeed, a review of the opinion filed by the Florida Supreme Court reflects that the court specifically found this particular aggravating circumstance applicable in Petitioner's case and cited other authorities to buttress its conclusion that circumstances as found in the instant case warranted said finding.

Petitioner cites to nothing more than the fact that "the Florida court's failure to limit the statutory

aggravating circumstance results apparently in part from its refusal to compare the death sentence in the present case with other death sentences imposed under the 'especially heinous, atrocious, or cruel' clause." [Petitioner's Petition, p.2]. Petitioner is wrong.

Respondent would submit that the "entire scheme of the aggravating circumstances as set forth in the Florida Statutes (§ 921.141)" is not unconstitutionally overbroad and does not impermissibly distort the weighing process required to prevent arbitrary infliction of the death penalty. While Petitioner did not raise this issue before the Florida Supreme Court, a cursory review of the issue on its merits fails to develop a claim which warrants review.

II.

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER RECEIVED THE STANDARD OF FAIR TRIAL MANDATED BY THE UNITED STATES CONSTITUTION.

A. WHETHER THE TRIAL COURT ERRED BY GIVING AN IMPROPER AND INSUFFICIENT INSTRUCTION TO THE JURY AS TO THE PROPER USE OF EVIDENCE OF PETITIONER'S PRIOR CONVICTIONS OF CRIME.

The Florida Supreme Court in resolving this claim adversely to Petitioner concluded:

> Appellant presents five points on appeal of his conviction. Among them is the argument that the court failed to adequately instruct the jury on the limited use they could make of Appellant's prior convictions, which were brought out on his cross-examination, and that this failure was reversible error. He argues that after eliciting the fact of the six convictions on cross-examination of Appellant, the prosecutor subsequently commented

> on them. Thus, he argues, the judge had a duty to instruct the jury that the evidence of prior convictions could only be used in evaluating the defendant's credibility and for no other purpose. We decline to discuss the merits of this argument because the defense attorney at trial did not object to the instruction on credibility or ask for a different of additional one. "An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made." State v. Barber, 301 So.2d 7, 9 (Fla. 1974). In order to secure appellate review of jury instructions, the defendant must make known to the court what charges he wants the court to give or not give, and his grounds therefore. See Williams v. State, 285 So.2d 13 (Fla. 1973), Fla.R. Crim.P. 3.390(d).
>
> [397 So.2d at 905]

Whether Petitioner was entitled to relief pursuant to this claim was not a matter reviewed by the Florida Supreme Court in that Petitioner failed to timely object or request specific instructions regarding comments made and questions asked concerning Petitioner's prior criminal activity. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977) controls. Where, as here, Petitioner failed to raise the issue or failed to object or failed to apprise the trial court of specific jury instructions desired, Petitioner is barred on appellate review from raising said claim. Therefore, pursuant to Henderson v. Kibbe, 431 U.S. 145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977), the instant issue for review does not raise a federal question entitling Petitioner to review.

B. WHETHER THE TRIAL COURT ERRED IN ADMITTING, BY DEPOSITION OF ANAHEIM, CALIFORNIA POLICE OFFICERS GERALD STEC AND FRANK TRESENRIDER EVIDENCE THAT THE PETITIONER HAD BEEN INVOLVED IN A GUN BATTLE WITH THE TWO OFFICERS AND OTHERS AT THE TIME OF HIS ARREST IN ANAHEIM, CALIFORNIA.

Petitioner's second subissue under his second question asserts that he was denied a fair trial because "in terms of relevancy, necessity, and quality, the introduction into evidence of the gun battle did not go to the material issue of first degree murder involved in this case." [Petitioner's Petition, p.6]. The Florida Supreme Court in rejecting said claim held:

> Appellant's third contention is that it was error to admit the testimony establishing that Appellant fired his gun in the direction of police officers in California. He argues that evidence of collateral criminal activity is inadmissible because of its potential prejudicial impact . . .

[397 So.2d at 907]

The court resolved said claim thusly:

> When a suspected person in any manner attempts to escape or evade a threatened prosecution bu flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstances. (cites omitted).
>
> We hold that the evidence of appellant's flight from police and the use of his gun was relevant to the issue of his guilty knowledge and thereby to the issue of guilt. Appellant was willing to use at least the threat of deadly force to try to avoid arrest. This is probative of his mental state at the time. Depositions were properly admitted.

[397 So.2d at 908]

Petitioner's second issue raises not a federal question, but rather, whether the State followed procedural

rules in the admission of depositions. The record reflects that there was no objection at trial to the admission of the depositions of Officers Spec and Tresenrider, but counsel objected to the admission of said evidence because said evidence was not necessary to the question of flight and was highly prejudicial. Pursuant to state law,

> The flight of a person accused of crime raises no presumption of guilt, rather is a circumstance that goes to the jury, to be considered by them with all the other testimony and circumstances and given such weight as the jury may determine it entitled to. The rule is that, when a suspected person in any manner endeavors to escape, or evade a threatened prosecution by flight, concealment, resistance to a lawful arrest, or other ex post facto indication of a desire to evade prosecution, such facts may be shown into evidence as one of a series of circumstance from which guilt may be inferred.

[Blackwell v. State, 86 So.2d 224 at 226 (Fla. 1920)]

This Court does not sit in judgment of state evidentiary and procedural matters. Whether said evidence was relevant, necessary, and admissible at trial was a matter for the trial court to decide in the execution of its discretion, and for the Florida Supreme Court to review for an abuse of discretion. Said claim does not equate to a denial of a fair trial on a federal constitutional level.

C. WHETHER IN LIGHT OF THE EXTENSIVE PUBLICITY COVERING THE CRIME FOR WHICH PETITIONER WAS ON TRIAL, THE TRIAL COURT'S DENIAL OF PETITIONER'S TIMELY MADE MOTION FOR A CHANGE OF VENUE WAS ERROR IN VIOLATION OF PETITIONER'S FUNDAMENTAL RIGHT TO A TRIAL BY AN IMPARTIAL JURY.

Petitioner's third subissue asserts that the wealth of publicity surrounding the death of Mr. Stone and the subsequent trial of Petitioner's co-defendant, Timothy

Palmes, resulted in a climate where the widespread notoriety of the case prevented Petitioner from receiving a fair trial, and therefore, it was error for the trial court to deny his Motion for Change of Venue. The Florida Supreme Court in reviewing this issue held:

> Appellant contends that the denial of his motion for change of venue deprived him of a fair trial because of widespread publicity. The record shows that the case received considerable media attention and that knowledge of the murder was widespread. Fourt-fifths of the prospective jurors, and eight of the twelve jurors who served on the jury had some prior knowledge of the case. The crucial consideration, however, is not knowledge, but whether such knowledge rendered the jurors prejudiced.
>
> A motion for change of venue is a matter addressed to the sound discretion of the trial court, and the trial court's decision will generally be upheld if there is no showing of a palpable abuse of discretion. Johnson v. State, 351 So.2d 10 (Fla. 1977); McNealy v. State, 17 Fla. 198 (1879).
>
> A motion for change of venue based on widespread prejudicial publicity called for a determination by the trial court of "whether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions, that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom."(cites ommited).
>
> Appellant arguest that new media converage of his co-defendant's confession brings this case within the rule of Oliver v. State, 250 So.2d 888, 890 (Fla. 1971) in which this court said that in general, "when a 'confession' is featured in news media converage or a prosecution . . . a change of venue motion should be granted whenever requested . . . "
> . . .
>
> [397 So.2d at 905-906]

The Florida Supreme Court concluded that Oliver v. State, 250 So.2d 888 (Fla. 1971) did not require reversal in the instant case.

> The trial judge here presided over a long and painstaking voir dire procedure. The record shows that prospective jurors exhibiting even a hint of prejudice were excluded. The court granted Appellant extra peremptory challenges and defense counsel did not use them all. The court did not abuse its discretion in denying the motion for change of venue.

[397 So.2d at 906]

In the instant case, fifty-four prospective jurors were interviewed prior to the selection of twelve men and women to sit as a jury. The Petitioner was allowed the regular ten peremptory challenges and was given two additional. Two challenges were not used. The Petitioner was allowed great latitude in time and in questioning each prospective juror and submitted each prospective juror to a exhaustive and rigorous voir dire. Upon the selection of twelve persons to sit as a jury, Petitioner made no further objections nor did he renew his Motion for Change of Venue. Pursuant to Murphy v. Florida, 421 U.S. 794, 44 L.Ed.2d 589, 95 S.Ct. 2031, (1975), Respondent would urge Petitioner was not denied fair trial based on the widespread publicity that surrounded Petitioner's case.

As noted in Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977):

> Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular, the voir dire examination of the jurors which would require a finding of constitutional unfairness as to the method of jury selection

> or as to the character of the jurors actually selected. But under Murphy, extensive knowledge in the community of either the crimes or the punitive criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asked us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a "trial atmosphere" . . . utterly corrupted by press coverage. Murphy v. Florida, supra, at 798. One who is reasonably suspected of murdering his children cannot expect to remain anonymous. Petitioner has failed to convince us that under the "totality of the circumstances," Murphy, supra, the Florida Supreme Court was wrong in finding no constitutional violation with respect to pre-trial publicity. The judgement of the Supreme Court of Florida is therefore affirmed.
>
> [432 U.S. at 303]

Similarly, in the instant case, Petitioner has failed to demonstrate facts and circumstances which mandate a contrary result to this Court's finding in Dobbert v. Florida, supra, and Murphy v. Florida, supra.

CONCLUSION

Based on the foregoing, Respondent would urge this Court to refuse to invoke certiorari jurisdiction in the instant cause and deny Petitioner's Petition.

Respectfully submitted:

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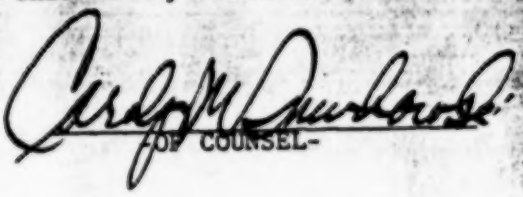
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished JOHN W. JOHNSON, Esquire, 210 Central Park South, New York, New York, 10019 via United States mail on this 2d day of October, 1981.



-OF COUNSEL-